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No. 94-688

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
WESTINGHOUSE ELECTRIC CORPORATION,
and ROY E. GRIFFIS,
Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

**On Writ of Certiorari to
the Supreme Court of Oklahoma**

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: February 21, 1995

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QUESTION PRESENTED

Whether state courts may refuse to grant federal remedies under 42 U.S.C. §§ 1983 and 1988 to persons who have successfully challenged state taxes as violating their rights under the Commerce Clause of the United States Constitution.

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INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this Court as well as other state and federal courts in cases where state taxing authorities are discriminating against interstate and/or foreign commerce or otherwise interfering with the ability of busi-

nesses to compete on an equal footing. *See, e.g., Barclays Bank PLC v. Franchise Tax Board*, 114 S. Ct. 2268 (1994); *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815 (1994); *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 112 S. Ct. 2365 (1992).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions.

WLF and AEF strongly believe that the economic well-being of this country depends on the unrestricted flow of commerce, both interstate and across our nation's borders. They believe that discriminatory taxing schemes such as the one struck down by the Oklahoma Supreme Court in this case can have extremely negative economic consequences, and that taxpayers who are subjected to such discrimination should be provided the tools necessary to obtain redress -- including access to all causes of action created under federal law.

Amici submit this brief in support of Petitioners with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Petitioners' brief.

To summarize, Petitioners are a corporation and an individual which operated commercial trucks in Oklahoma in 1984, as well as a national trade association for trucking firms. In 1984, Petitioners filed suit in Oklahoma state court against the Oklahoma Tax Commission and certain of its officials, challenging the constitutionality of an Oklahoma tax imposed on Petitioners but not on Oklahoma

trucking companies. Petitioners had paid the tax under protest before filing suit. Petitioners asserted a right of action both under an Oklahoma statute (OKLA STAT. tit. 68, § 226 (1981)) and under 42 U.S.C. § 1983. Petitioners sought an award of attorney fees under 42 U.S.C. § 1988.

In 1990, the Oklahoma Supreme Court granted Petitioners partial relief under § 226. The court found that the challenged statutes were "plainly discriminatory" because they favored in-state business over out-of-state business and thus violated the Commerce Clause of the U.S. Constitution. Petition Appendix ("Pet. App.") 34a-38a. The court granted Petitioners a partial refund of taxes paid under the challenged statutes. *Id.* at 38a-46a. The court held that Petitioners could not maintain a right of action under 42 U.S.C. § 1983, and thus that Petitioners were not entitled to an award of attorney fees under 42 U.S.C. § 1988.

Petitioners filed a petition for writ of certiorari to review, *inter alia*, the Oklahoma Supreme Court's denial of their claims under 42 U.S.C. §§ 1983 and 1988. While the petition was pending, this Court issued its decision in *Dennis v. Higgins*, 498 U.S. 439 (1991), which held that suits for violation of the Commerce Clause may be brought under 42 U.S.C. § 1983. On July 31, 1991, the Court issued an order vacating the Oklahoma Supreme Court's 1990 decision in this case and remanding for reconsideration in light of *Dennis*.

In 1994, the Oklahoma Supreme Court issued an opinion reaffirming its prior decision that Petitioners were not entitled to relief under §§ 1983 and 1988. Pet. App. 1a-11a. The court based its decision on "principles of comity and federalism" (Pet. App. 6a) and cited the Tax Injunction Act, 42 U.S.C. § 1341, as reflecting a federal policy against use of federal remedial schemes to challenge state taxes. *Id.* at 8a-9a. The court said that *Dennis* was not to the contrary, because it did not address the issue raised in this case: "whether a state court should decline to impose federal remedies when state remedies are adequate and a federal court would, therefore, be prohibited

from enforcing such remedies under the Tax Injunction Act." *Id.* at 7a.

On October 17, 1994, Petitioners filed a second petition for writ of certiorari, seeking review of the Oklahoma Supreme Court's refusal to recognize a right to redress under §§ 1983 and 1988. The Court granted the writ on January 6, 1995.

SUMMARY OF ARGUMENT

The decision of the Oklahoma Supreme Court is in direct conflict with this Court's decision in *Howlett v. Rose*, 496 U.S. 356 (1990). In *Howlett*, the Court held that state courts of general jurisdiction may not pick and choose among those § 1983 causes of action that they are willing to recognize. Provided (as here) state courts have jurisdiction to hear some § 1983 causes of action, they may not refuse to hear others except on the basis of some neutral state rule regarding the administration of the courts. Not only has Oklahoma not suggested any such neutral rule in this case; it has been quite open in admitting that its decision is based on hostility to one particular aspect of the § 1983 cause of action -- the availability of attorney fees to prevailing plaintiffs. *Howlett* expressly forbade discrimination against a federal cause of action based on disagreement with the federal policies underlying that cause of action.

Oklahoma's resort to principles of "comity" and "federalism" is misplaced. "Comity" refers to voluntary restraints by the federal courts to avoid interfering with the ability of state governments to operate autonomously. Recognition of Petitioners' § 1983 cause of action would create no such interference. The most that could be said is that such recognition would result in a moderate depletion of state treasuries in order to pay attorney fee awards. But the same could be said of any of the numerous types of awards against state governments authorized pursuant to federal law, yet it has never been

suggested that principles of "comity" dictate that all such awards should cease.

ARGUMENT

I. STATE COURTS MAY NOT REFUSE TO HEAR § 1983 CHALLENGES TO STATE TAXES, AT LEAST WHERE THE COURTS HAVE JURISDICTION OVER OTHER § 1983 ACTIONS

The only difficult issue raised in this case -- whether the Commerce Clause confers "rights, privileges, or immunities" on Petitioners within the meaning of 42 U.S.C. § 1983 -- was conclusively settled in *Dennis*. The Court there decided that the Commerce Clause *does* confer such "rights, privileges, or immunities" and thus that suits for violation of the Commerce Clause could be brought under § 1983.[1] *Dennis*, 498 U.S. 439 (1991).

The Oklahoma Supreme Court now contends that, despite the clear holding of *Dennis*, the Oklahoma courts are entitled to decline to hear § 1983 challenges to state tax laws under the circumstances of this case. That contention amounts to an assertion of a state court's right to discriminate against federal causes of action -- an assertion that has been squarely rejected by this Court on numerous occasions.

There can be little doubt that the Oklahoma Supreme Court's unwillingness to recognize a § 1983 cause of

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[1] 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

action was grounded in its hostility to the § 1988 attorney fee awards that such recognition would entail. The court stated repeatedly that the only significant difference between the § 1983 right of action under federal law and the § 226 right of action under state law was that taxpayers who prevailed under § 1983 could recover attorney fees while those who prevailed under § 226 could not. Pet. App. 6a-10a. The court stated that "the basis for its opinion" denying a § 1983 right of action was a "desire for intrastate consistency" (*id.* at 10a n.5), i.e., a desire to avoid recognition of a right of action that would provide prevailing taxpayers greater rights than those afforded under state law. The court also quoted approvingly from Justice Kennedy's dissenting opinion in *Dennis*, which expressed concern that the majority opinion, by providing taxpayers with access to § 1988 fee awards, might threaten "state fiscal integrity." *Id.* at 7a, quoting *Dennis*, 498 U.S. at 464-65 (Kennedy, J., dissenting).

Thus, this is not a case in which a state court applied some neutral state rule regarding the administration of the courts in declining to exercise jurisdiction over a federal cause of action. Rather, in declining to recognize a § 1983 right of action, the Oklahoma Supreme Court expressed a clear preference for state-law procedures over federal-law procedures and declined to give effect to the latter because they were broader than the former. This Court has repeatedly refused to permit such discrimination against federal causes of action, most recently in *Howlett v. Rose*, 496 U.S. 356 (1990). In *Howlett,* the Court refused to permit Florida courts to decline to hear § 1983 claims against a school board on the ground that the school board would be protected by sovereign immunity against similar claims brought under state law. *Howlett*, 496 U.S. at 380-81.

The Oklahoma Supreme Court's assertion that the remedies available under § 1983 (including § 1988 attorney fees) are in some way inconsistent with state-law remedies reflects a fundamental misconception of the nature of laws adopted by Congress. Although § 1983 was adopted by

Congress and not the Oklahoma state legislature, it is just as much a part of Oklahoma law as is § 226. As the Court recognized in *Howlett*:

> Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . The two together form one system of jurisprudence, which constitutes the law for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

Howlett, 496 U.S. at 367 (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876)).

Because § 1983 is part of the "Law of the Land" in Oklahoma, Oklahoma courts may not refuse to recognize a § 1983 right of action because of policy objections to some aspect of the right of action. "The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.* at 371. *See also, Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 57 (1912)(congressional "policy is as much the policy of [a State] as if the act [of Congress] had emanated from its own legislature, and should be respected accordingly in the courts of the States").

This is not a case in which a state has declined to exercise jurisdiction over a federal claim based on some neutral state rule regarding the administration of the

courts.[2] Rather, Oklahoma's courts are courts of general jurisdiction which routinely hear § 1983 cases; and the Oklahoma Supreme Court readily admitted that it had *jurisdiction* to consider Petitioners' § 1983 claim but said that it nonetheless was declining to hear those claims for reasons of "comity" and "federalism." Pet. App. 9a-10a. Once jurisdiction over a federal court is established, a state court is not free to refuse to exercise that jurisdiction. "The existence of the jurisdiction creates an implication of duty to exercise it." *Mondou,* 223 U.S. at 58. Thus, the Court has held that the Supremacy Clause prohibits "a state court of general jurisdiction" from refusing to provide courts for enforcement of the Federal Employers' Liability Act "solely because the suit is brought under a federal law." *McKnett v. St. Louis & San Francisco R. Co.*, 292 U.S. 230, 233-34 (1934). In light of the Oklahoma courts' admitted jurisdiction over Petitioners' § 1983 claims, the Supremacy Clause requires Oklahoma to exercise that jurisdiction.

II. PRINCIPLES OF "COMITY" AND "FEDERALISM" DO NOT JUSTIFY OKLAHOMA'S REFUSAL TO RECOGNIZE PETITIONERS' § 1983 CLAIMS

In declining to recognize a § 1983 right of action, the Oklahoma Supreme Court did not directly address the *Howlett* line of cases. Rather, the court distinguished *Howlett* in a single sentence by noting that *Howlett* did not address "the issue of whether a state court should decline to impose federal remedies when state remedies are adequate and a federal court would, therefore, be prohibited from enforcing such remedies under the Tax Injunction Act." Pet. App. 7a.

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[2] This Court has understandably been quite reluctant to order state courts to accept jurisdiction over a class of federal claims which are of a type over which the state courts do not ordinarily exercise jurisdiction. Indeed, the Court has never decided whether states can be forced to create courts competent to hear *any* § 1983 claims. *See Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

Howlett did not, of course, discuss the Tax Injunction Act, since it did not arise in a tax collection context. But nothing in the Court's broadly worded opinion gave the slightest indication that state courts are free to decline to recognize § 1983 causes of action so long as state-law remedies are "adequate." Indeed, the Court has previously held that the existence of a state-law remedy does not negate the availability of federal relief under § 1983. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

More fundamentally, in citing principles of "comity" as a reason for declining to recognize a § 1983 cause of action, the Oklahoma Supreme Court has misconstrued this Court's use of that term in prior cases.

The term "comity" connotes one's willingness to defer to another as a matter of courtesy even when not required to do so. In the judicial context, comity is "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference or respect." *Black's Law Dictionary* (4th ed. 1968). At first blush, it is difficult to discern what relevance "comity" has to this case, since the Oklahoma Supreme Court gave no hint that it was deferring to the laws of any other jurisdiction.

This Court most fully explained its understanding of "comity" in the federal/state context in *Younger v. Harris*, 401 U.S. 37 (1971), which held that federal courts should not enjoin pending state-court criminal prosecutions except under extraordinary circumstances. Although recognizing that federal courts have the *power* to issue such injunctive relief, the Court held that federal courts should not do so for reasons of "federalism" and "comity." *Younger*, 401 U.S. at 44-45. The Court explained "the notion of 'comity'" as:

> [A] proper respect for state functions, a recognition of the fact that the entire country is made

> up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways . . . [T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

The Court applied *Younger* in the state tax collection context in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981). *McNary* involved a § 1983 suit filed in federal court by taxpayers seeking damages against county real estate tax officials for alleged due process and equal protection violations in collection of real estate taxes.[3] The Court held that such suits "are barred by the principle of comity." *McNary*, 454 U.S. at 116. The Court reasoned that permitting such federal-court suits would be extremely disruptive of state tax collection efforts (*id.* at 112-115); the Court said that "the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts" and that notions of "comity" and "federalism" dictated the preservation of such autonomy and fiscal stability. *Id.* at 102-03, 104-05.

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[3] The Tax Injunction Act, 28 U.S.C. § 1341, did not act to bar the suit, because the suit sought money damages rather than injunctive relief. Section 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Neither *Younger* nor *McNary* provide any support for the Oklahoma Supreme Court's ruling. Those decisions made clear that "comity" refers to voluntary restraint by the federal courts to avoid interfering with the ability of state governments to operate autonomously. Petitioners do not seek the right to use the federal courts to interfere with state tax-collection activities; rather, in recognition of the autonomy of the Oklahoma state government, Petitioners sought relief in the Oklahoma courts. It is no affront to principles of "comity" or "federalism" to insist that Oklahoma courts recognize (as made clear by *Howlett*) that § 1983 is just as much a part of Oklahoma law as is § 226 or any other Oklahoma statute. Indeed, *McNary* noted that the Missouri courts were willing to recognize the taxpayers' § 1983 claims, without any indication that it viewed such recognition as an affront to principles of comity. *McNary*, 454 U.S. at 116.

The Tax Injunction Act, 28 U.S.C. § 1341, adds nothing to Oklahoma's argument. As is true of the principles of "comity" outlined in *McNary*, that statute is aimed at preventing federal court interference with state tax-collection activity. The purposes underlying § 1341 simply do not come into play when a taxpayer seeks to enforce a § 1983 right of action in state court.

The Oklahoma Supreme Court noted that Petitioners were forbidden by § 1341 from asserting their § 1983 cause of action in federal court. It then concluded that the § 1983 cause of action should not be recognized in state court either; otherwise, the court reasoned, the outcome of the § 1983 claim would depend on whether it had been brought in state or federal court, a supposed "perver[sion]" of this Court's "wise policy of intrastate uniformity between state and federal courts." Pet. App. 8a. The court cited *Felder v. Casey*, 487 U.S. 131 (1988), for the proposition that "one of the principles of comity is that potential differences in remedies available in state court and federal court should be avoided." *Id.*

The Oklahoma Supreme Court has completely misconstrued *Felder*. That case held that the Wisconsin state courts could *not* defeat a § 1983 cause of action by invoking a state law notice-of-claim requirement which would not have been recognized in federal court. Contrary to the Oklahoma Supreme Court's assertion, *Felder* never indicated that this preemption of a state law requirement (in order to achieve uniformity of result in state and federal courts) was an illustration of "comity"; indeed, it was quite the opposite, because *Felder* declined to defer to the state procedural requirement. Moreover, there is nothing inconsistent between the absence of jurisdiction over Petitioners' § 1983 claims in the federal courts and the recognition of those claims in Oklahoma state courts. In declining to exercise jurisdiction, the federal courts are not expressing any opinion on the merits of such claims; indeed, declining to exercise jurisdiction is the essence of comity and provides absolutely no support for Oklahoma's refusal to recognize a § 1983 claim.

The Oklahoma Supreme Court also cited with approval an assertion by the North Dakota Supreme Court that "the proscriptions of the Tax Injunction Act are based at least in part upon deference to state remedial schemes." Pet. App. 6a-7a (quoting *Linderkamp v. Bismark School District No. 1*, 397 N.W.2d 76 (N.D. 1986)). That is a misreading of § 1341; there is no indication in the language or history of § 1341 or this Court's case law construing § 1341 that Congress intended to create "deference to state remedial schemes." The sole concern of § 1341 is to prevent "federal court interference in state tax matters." *See Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522-524 (1981); *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

Finally, the Oklahoma Tax Commission's citation to the Oklahoma Supreme Court's decision in *Wilhelm v. Gray*, 766 P.2d 1357 (Okla. 1988), *cert. denied*, 490 U.S. 1092 (1989), is inapposite. Respondents' Brief in Opposition to Petition at 12-13. *Gray* held that Oklahoma had not deprived the plaintiff of liberty and property

without due process of law because the plaintiff had been offered an adequate post-deprivation hearing. That decision was based on decisions of this Court (such as *Parratt v. Taylor*, 451 U.S. 527 (1981)) which make clear that provision of an adequate post-deprivation hearing often is all the process that is due an individual under the Due Process Clause. However, Petitioners have asserted claims under the Commerce Clause. There is no similar post-deprivation-hearing doctrine applicable to Commerce Clause claims; for example, a state does not eliminate a Commerce Clause violation simply by providing taxpayers who have been the victims of a discriminatory tax with a full opportunity to contest the tax under state law.

In sum, the availability of an "adequate" state-law remedy does not negate Petitioners' right to pursue a § 1983 cause of action.[4] Indeed, if the adequacy of alternative remedies were the key consideration, then *Howlett* presented a far stronger case for application of "comity" principles than does this case. In *Howlett*, the plaintiff had the option of asserting his § 1983 cause of action in federal court; he voluntarily chose a state-court forum. In contrast, § 1341 prevented Petitioners from asserting their claims in federal court. Yet, the Court did not hesitate in *Howlett* to require the Florida courts to recognize the § 1983 claims of the plaintiff in that case. Accordingly, Petitioners' right to proceed in state court with their § 1983 claims should be recognized without regard to the adequacy of their alternative state-law remedies.

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[4] The "adequacy" of the § 226 remedy under Oklahoma law is certainly subject to question. Most obviously, it does not provide Petitioners with the same right to attorney fees available under § 1983. Moreover, a § 1983 plaintiff is entitled to pursue a damage claim (including a claim for consequential and punitive damages) against any "person" within the meaning of § 1983 -- a category that includes all state tax officials being sued in their individual capacities, as well as all local taxing authorities and officials. Also, defenses to a § 1983 action are a matter solely of federal law. It is not at all clear that remedies created under Oklahoma law provide nearly as many rights to taxpayers.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Education Foundation respectfully request that the Court reverse the decision of the Oklahoma Supreme Court.

Respectfully submitted,

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